CHAPTER 12: PRO SE *ANDERS* BRIEFS: WHAT A CRIMINAL DEFENDANT SHOULD DO WHEN HIS OR HER ATTORNEY FILES AN *ANDERS* BRIEF.

A. Introduction.

This chapter is intended to aid a defendant whose appellate attorney has filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), on appeal from a criminal conviction and sentence or postconviction motion. This chapter describes how to write a pro se or "self-represented" brief after the appellate court has permitted the appellate attorney to withdraw or allows the defendant an opportunity to raise issues in a pro se brief.

B. What is an *Anders* Brief and Why Would an Attorney File One?

The defendant is not entitled to a perfect appeal; however an appellate attorney has a duty to support her client's appeal to the best of her ability. Under the Rules Regulating the Florida Bar (the code of ethics that regulates all attorneys who practice in Florida), an appellate attorney must study the trial court record to determine which, if any, issues have merit and should be appealed. Attorneys are forbidden by the code of ethics from filing "frivolous" documents in court. Frivolous means that the documents have no serious purpose, meaning, or merit. Sometimes, the appellate attorney representing a defendant finds that the case does not have any nonfrivolous issues to raise on appeal (i.e., all of the issues that the attorney might raise on appeal have no serious purpose, meaning, or merit). In those circumstances, the appellate attorney may file an *Anders* brief. In the *Anders* brief, the attorney explains to the court that he or she believes the appeal presents no issues that can be argued in good faith as grounds to reverse the judgment, sentence, or order being appealed. Nevertheless, the attorney must also identify facts in the record that, despite not rising to the level of grounds for reversal, the appellate attorney believes could arguably support the appeal. In so doing, the appellate attorney balances his or her ethical responsibility to the courts not to raise frivolous issues on appeal with his or her ethical responsibility to protect the defendant's constitutional rights. If the attorney files an *Anders* brief, he or she may also file a

motion to withdraw from representing the defendant. Whether the motion to withdraw is required varies in different appellate courts.

In the *Anders* brief, the attorney identifies any facts in the record or law that might arguably support the appeal. When the attorney files an *Anders* brief, he or she must send a copy of the *Anders* brief and his or her motion to withdraw, if she files one, to the defendant. In either the motion to withdraw or the brief, the attorney will request that the court allow the defendant to file his or her own brief. Once the appellate attorney files an *Anders* brief, the appellate court will give the appellant an opportunity to file a brief on his or her own behalf. This brief filed by the defendant is commonly referred to as a "pro se brief." The defendant may raise any issues he or she wants the appellate court to consider in the pro se brief.

When an *Anders* brief is filed, the appellate court performs a full review of the record to discover if any debatable issues exist. In some appellate courts, the appellate court, after conducting its own review, may order the appellate attorney to file a supplemental brief on the merits. This does not mean that the appellate court will grant relief on an issue, only that the facts warrant more briefing on appeal. Even if it does not order supplemental briefing, the appellate court will consider the *Anders* brief and, if one is filed, the pro se brief. The appellate court will also consider the State's answer brief and any reply brief, if those are filed. After the court has reviewed the record and all briefs, it will issue a decision.

C. Receiving the *Anders* Brief and the Record on Appeal.

When the appellate attorney files an *Anders* brief, he or she must send a copy of that brief to his or her client. Most are sent with proof of delivery to ensure that the defendant promptly receives the *Anders* brief. The appellate court will then issue an order granting the defendant a specific number of days, usually 30, to file a pro se brief. When the appellate court issues that order, the appellate attorney will send the record directly to the defendant or, if the office that

appointed the appellate attorney has a policy that requires the record be returned directly to that office, then the appellate attorney will return the record to the assigning office which will, in turn, send the record directly to the defendant.

D. Compliance with Florida Rule of Appellate Procedure 9.210.

The pro se brief must comply with Florida Rule of Appellate Procedure 9.210. Please refer to the Writing an Appellate Brief chapter of this handbook for directions on how to prepare the brief and what the brief includes (Chapter 5).

E. Prison Law Libraries & Inmate Law Clerks.

Florida prisons are generally required to provide law libraries to ensure that inmates have adequate legal materials to prepare court documents. The prison will also usually assign inmate law clerks who have completed a training class to assist inmates in doing legal research and preparing court documents. The Florida Supreme Court and the Rules Regulating The Florida Bar forbid the "unlicensed practice of law." That means a nonlawyer (including an inmate law clerk, a lawyer from another state, or a law student) cannot give legal advice or represent anyone in court proceedings unless they have a license to practice law in Florida. In other words, a nonlawyer without a Florida license to practice law cannot give legal advice to anyone or attempt to act as another person's lawyer either in written papers or in court appearances. The Department of Corrections has rules regarding the use of law libraries that may differ between particular prisons. Because writing a pro se brief requires some legal research, it is important to learn the prison's rules for use of the law libraries and inmate law clerks.

F. The Goal in Writing a Pro Se Brief.

The appellant's goal in writing a pro se brief is to show that reversible error occurred during the trial court proceeding. In order to obtain relief on appeal, the appellant must show that the trial court made a legal error. To warrant reversal on appeal, for almost every error, the appellant must

also demonstrate that it affected the outcome of the case – that is, that the error was not "harmless."

G. Ineffective Assistance of Counsel.

A pro se brief in an *Anders* case is typically not the place to raise claims that the trial attorney did not provide effective assistance during the trial court proceedings. As a general rule, claims for ineffective assistance of counsel cannot be considered on direct appeal from the final judgment and sentence. See Corzo v. State, 806 So. 2d 642, 645 (Fla. 2d DCA 2002). Therefore, in most cases the pro se brief should not include claims and argument that the trial attorney did something wrong or did not do something to aid the case.

Ineffective assistance of trial counsel claims should be raised after the direct appeal in a motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. The trial court cannot rule on a rule 3.850 motion while the case is pending in the appellate court on direct appeal. A defendant generally has two years from the date the appellate court decision becomes final to file a rule 3.850 motion. However, if the defendant wants to preserve the right to file postconviction claims in federal court pursuant to a 28 U.S.C. § 2254 habeas petition, the rule 3.850 motion must generally be filed within one year from the date of the appellate court decision in order to "toll" (pause or delay) the one-year federal limitations period. Please review the chapter on postconviction motions for more information (Chapter 13).

H. Writing a Pro Se Brief.

1. How to Begin Writing a Pro Se Brief.

Writing appellate briefs is addressed in greater detail in the Writing an Appellate Brief chapter in this handbook (Chapter 5). The following is a summary of key points for writing a pro se appellate brief when an *Anders* brief has been filed.

First, the record on appeal from the trial court case must be read in its entirety, including all the legal documents that were filed, and the transcripts from the hearings and trial, if any. When

writing the pro se brief, an appellant should not rely on mere memory of what happened in the trial court. The appellate court will only consider the documents, facts and evidence in the record on appeal. Notes taken while reading the record will assist in later citing the correct page numbers when referring to the record in the brief.

Second, decide what the issues are to be raised and argued in the brief by thinking about what occurred during the proceedings. An appellant may only raise issues that were properly preserved for appellate review by being first raised in the trial court. If trial counsel did not bring the issue up before the trial court, it can only be reviewed on appeal if it is a fundamental error. A fundamental error is an error which reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error. Because fundamental error is relatively rare, an appellant should consider issues raised by the trial attorney in a motion or an objection and which the trial court ruled against. For sentencing errors, Florida Rule of Appellate Procedure 9.140(e) requires that errors be raised in the trial court first, either by objection at sentencing or through a Florida Rule of Criminal Procedure 3.800(b) motion (which can be filed before or during the direct appeal, if necessary). Please refer to this handbook's chapter on postconviction motions (Chapter 13) for a more thorough discussion of how to raise a sentencing error in a Rule 3.800(b) motion.

Third, the appellant should consider whether the record contains all of the documents from the court file and transcripts needed to present the issues to be raised on appeal. Sometimes a hearing transcript, notice, or motion needed for the appeal will not be included in the record. If that occurs, then a party wanting to include the document may need to file a motion to supplement the record under Florida Rule of Appellate Procedure 9.200(f). The motion to supplement is discussed in more detail in the chapter on Pulling Together the Record on Appeal (Chapter 3). The motion briefly explains what court file document or transcript is missing and why it is needed.

The appellate court will issue an order granting or denying the motion to supplement. If granted, the appellate court will generally allow 30 days to supplement the documents, but may allow more or less time if needed. The appellate court will send a copy of its order to the trial court clerk, who supplements the missing court documents. However, it remains the appellant's responsibility to be sure the missing documents are supplemented within the allowed time. If the missing documents are not supplemented, that party must ask for an extension of time in the appellate court and contact the trial court clerk. If the missing document is a hearing transcript, the party must file a motion to transcribe in the trial court so that an order can be entered that directs the court reporter to transcribe the hearing.

Fourth, the appellant must do legal research to find case law and statutes that support his or her argument. The inmate law clerk can assist in doing the research in the law library, but cannot legally tell the appellant what he or she should argue on appeal. Sometimes the legal research will show that an issue that seemed unfair is not a strong one to raise. On the other hand, the legal research might show that there is an issue to raise that the appellant had not yet thought of. Research of the law is very important to any appellate brief.

Fifth, the appellant must determine the standard of review for each issue being raised on appeal. The cases will often explain which standard of review will apply to the type of error being alleged. There are many different standards of review. For example, if the trial court applied the wrong law, then the appellate court applies the "de novo" standard. Rulings on motions for judgment of acquittal are examples of issues of law that require de novo review. When the de novo standard is applied, the appellate court is not bound by what the trial court ruled and it considers the issue anew. In other instances, the trial court has discretion to make a ruling. The decisions to admit or exclude evidence are discretionary rulings. These issues will be reviewed under the "abuse of discretion" standard. To prove that the trial court abused its discretion, it must

be shown that the ruling was arbitrary and that no reasonable judge would have made the same ruling.

Sixth, the appellant should make an outline of the argument section of his brief. That outline should list the issues the appellant intends to raise and the standards of review for each of those issues. The appellant should make notes about the facts that support the issues he plans to include in the brief. The appellant should make similar notes about the case law and statutes that support his argument. This outline will help organize the arguments and present it to the appellate court in a clear and concise manner when writing the brief.

2. Writing the Pro Se Brief

Statement of the Case and Facts: In filing an *Anders* brief, the appellate lawyer was first required to review the trial court record and refer to every legal point that might support an appeal. The *Anders* brief should contain a statement of the facts, so the pro se brief usually does not need to restate the same facts. Instead, the appellant should limit the statement of the facts to those that are needed to understand the issues raised in the pro se brief. For example, if the appellant believes the trial court incorrectly denied a motion to suppress evidence, the pro se brief should include facts about the motion to suppress, the hearing on the motion, and the court's ruling.

Summary of the Argument: The summary of the argument is located before the argument in the pro se brief. But it is often written last. It summarizes the argument and does not exceed five pages, although it is usually much shorter. *See* Fla. R. App. P. 9.210(b)(4). Once the argument is written, the pro se party should pick out the key ideas from the argument and use those key points as the summary of argument. (Or, if the summary of the argument is written first, it can be used as an outline for writing the issues in the argument section).

Argument: The pro se party should use the outline he made to organize the argument into sections for each issue. First, the pro se party should state the issue. The pro se party should then

give the standard of review for that issue. Next, he or she should explain the general law that applies to that issue, citing cases and statutes that support the argument. It is not generally necessary to cite to a large number of cases that basically say the same thing, but the cases and statutes that most closely relate to the issues being raised in the specific appeal should be cited to communicate the legal basis of the appellant's claim.

After explaining what law governs the court's decision, the pro se appellant should identify the facts that show that a reversible error occurred. He or she should cite to the volume and page number in the record to direct the appellate court to the facts that support his case. Cases with facts similar to those involved in his appeal should be cited, to show how courts have applied the general law that the pro se appellant identified in the first part of the argument. After the pro se party explains how the facts in the case show that a legal error was made, the party then tells the appellate court what relief it should grant. For example, some mistakes require reversal and remand for a new trial, and others require reversal and dismissal or resentencing.

This same procedure should be repeated for each issue raised in the pro se brief.

Conclusion: At the end of the brief, the appellant should include one paragraph that tells the appellate court what relief or outcome the pro se appellant is asking for in the case. The relief may be different depending on whether the court reverses on one or more issues. For instance, the mistakes may require a new trial or a new sentencing hearing. Litigants often also request "whatever other relief the Court finds appropriate" or a similar broad request for relief.

Table of Contents: After the pro se party has finished writing his or her brief, each section of the brief is listed in the table of contents with the page numbers where each section begins. Each issue within the Argument section should also be listed with its beginning page number.

Table of Citations: All the cases cited in the brief are listed in alphabetical order. Then all statutes cited in the brief are listed in numerical order. If other authority is cited, such as books or

articles, they are also listed. The page numbers where each authority is cited should be included next to each listing.

Certificate of Service and Certificate of Typeface Compliance: A certificate of service at the end of the pro se brief is included to show that a copy of the brief was mailed to the opposing attorney in the case. Examples of a certificate of service for pro se appellants are included in Florida Rule of Appellate Procedure 9.420(d). If the pro se brief is typed, it is typed in either Times New Roman 14-point font or Courier New 12-point font and must include a certificate saying the brief is typed in one of those fonts at the end of the brief. The fonts and other requirements for typed briefs are listed in Florida Rule of Appellate Procedure 9.210(a). If the brief is handwritten, it is not necessary to include a certificate of typeface compliance.

Page Limit: The pro se brief cannot exceed fifty pages without permission from the appellate court, which is rarely granted. Fla. R. App. P. 9.210(a)(5).

I. Motions for Extension of Time in an *Anders* Appeal.

The appellate court informs the pro se party of how many days the pro se party has to file and serve his pro se brief. Most appellate courts generally allow 30 days. The pro se party must complete the brief and mail it to the court and the opposing attorney within that time limit. If it will take longer to obtain and read the record, do the legal research, and write the brief than the time that the appellate court allows in the order, the pro se party should file a motion for extension of time to serve the pro se brief. The motion for extension of time must be served before the brief is due and it should ask for a specific amount of additional time or number of days needed to finished, serve and file the brief.

J. Filing and Serving the Pro Se Brief.

After the pro se party has finished writing the brief, he or she must file the original signed brief with the appellate court and must also serve a copy of the brief to the opposing attorney

(usually by mail or delivery). For serving a copy, the Florida Attorney General's Office represents the State in criminal appeals, and an Assistant Attorney General will be the opposing attorney in criminal cases. The pro se appellant must complete the certificate of service at the end of the brief and indicate the day that the pro se party gave the brief to the prison authorities for mailing. For filing with the appellate court, most courts used to require pro se appellants to deliver the original and three copies of the brief to the appellate court. But now most appellate courts only require the original signed copy of the brief to be filed. This does not change the requirement that the pro se appellant still must also serve a copy of the brief to the opposing attorney.

K. Answer Briefs.

The State may file an answer brief to respond to the arguments raised in the pro se brief. However, generally the State will not file an answer brief unless ordered by the court. If the State is ordered or chooses to file an answer brief, the attorney representing the State must mail a copy of the answer brief to the pro se party, just as the pro se party must mail a copy of the initial brief to the State attorney. Answer briefs are addressed in more detail in the chapter on Writing an Appellate Brief (Chapter 5).

L. Reply Brief.

If the State files an answer brief, the pro se party should carefully read it and take notes to outline the arguments that are made in the answer brief. The pro se party is not required to file a reply brief and, therefore, should determine if he needs to respond to any of the State's arguments. If the pro se party decides to respond, then the pro se party does so by filing a reply brief. The reply brief is due 20 days after the answer brief is served. If the answer brief was sent by mail or e-mail, then five more days are added to the due date of the reply brief. Like the initial brief, it also contains a table of contents, table of citations, summary of argument, argument, conclusion, a certificate of service, and certificate of typeface compliance. It is not necessary to include

another statement of the case or facts. The reply brief may do so, however, if doing so is necessary to refute facts stated in the answer brief. The reply brief is limited to 15 pages, not including the table of contents, the table of authorities and the certificate of service. The reply brief is supposed to respond to the State's answer brief arguments. It is not supposed to merely restate the argument from the initial brief, and it cannot raise new arguments that were not raised in the initial brief. Reply briefs are addressed in more detail in Chapter 5 on Writing an Appellate Brief.

M. Disposition in the Appellate Court.

After all the briefs have been filed in the appellate court, the case will be assigned to a panel of 3 appellate judges to review the appeal. The exact procedures for handling *Anders* appeals vary from court to court; however, generally a law clerk or staff attorney will first review the record on appeal and the briefs and prepare a memorandum for the judges to review. Each judge will review the memorandum, briefs, record on appeal, and appeal case file. If the panel of judges determines that a potentially meritorious issue has been raised in the case, the court will generally order the court-appointed attorney to file a brief, in addition to the already-filed *Anders* brief, addressing the potential merit of the issue. The State of Florida will then be given an opportunity to respond. The appellate court will consider the supplemental briefs and decide how to rule on the case. A written decision, or opinion, indicating the appellate court's ruling will then be sent to the appellant and all the attorneys.

N. Motions for Rehearing, Clarification, Certification, and Rehearing En Banc.

After the appellate court issues its decision, a post-decision motion, such as a motion for rehearing, clarification, or certification, may be filed with the appellate court within 15 days. These motions are unusual in that they are only filed if a legitimate argument for relief can be made. They are rarely granted. Florida Rule of Appellate Procedure 9.330 provides that a "motion for rehearing shall state with particularity the points of law or fact that in the opinion of the movant

the court has overlooked or misapprehended in its decision." The motion should not be used to raise issues that were not previously argued in the briefs. "A motion for clarification shall state with particularity the points of law or fact in the court's decision that in the opinion of the movant are in need of clarification." Often, the appellate court will issue a decision without opinion, which is commonly called a "per curiam affirmance" or "PCA." If that occurs and the pro se party believes "a written opinion would provide a legitimate basis for supreme court review," that party may file a motion to request that the court issue a written opinion.

A motion for rehearing en banc requests review of the decision by all of the active judges on the appellate court. A pro se appellant should only file a motion for rehearing en banc when there are grounds that the case is of exceptional importance or that such consideration is necessary to maintain uniformity in the court's decisions. A motion based on any other ground will be stricken. Fla. R. App. P. 9.331(d). Post-decision motions are addressed in more detail in Chapter 19 on Post-Decision Motions.

O. Mandate.

The appellate court will usually issue its mandate 15 days after it issues its decision or 15 days after it rules on any post-decision motions that are filed. The mandate is the appellate court's last official act in the case, the appellate final judgment, and signals the end of the appeal. A mandate may be recalled at the discretion of the appellate court, but not more than 120 days after it issues (this is very rare).

Current through June 2016
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